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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 19

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| TEAMSTERS UNION LOCAL NO. 206,<br><br>and<br><br>SAFEWAY, INC. | Case 19-CB-168283<br>19-CB-178098<br>19-CB-192630 |

**RESPONDENT'S ANSWERING BRIEF IN OPPOSITION TO GENERAL COUNSEL'S AND CHARGING PARTY'S EXCEPTIONS AND IN SUPPORT OF RESPONDENT'S LIMITED CROSS-EXCEPTION**

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## I. INTRODUCTION

In 2016, as part of a merger between the Safeway and Albertsons store chains, Charging Party Albertsons ("Employer") decided to transfer the work of supplying Safeway stores from its larger " Clackamas" warehouse in Clackamas, where Local 206 represented employees in three large departments, to its smaller "PDC" warehouse in Portland, where Teamsters Local 305 represented a wall-to-wall unit. Local 305 and the Employer agreed that Local 305 would represent all employees after the transfer, including those previously represented by Local 206. They did so without a Board election and without a showing that Local 305 represented the legally required "sufficiently predominant majority" of the combined workforce.

The central question in this case is whether Respondent Local 206 violated the Act by refusing to honor this unlawful recognition during effects bargaining.

Insistence is a high bar, requiring far more than that Local 206 proposed something. While Respondent made a number of proposals about the details of the transition process and how representational issues would be handled, it showed great flexibility on most of them. It stood firm only on its refusal to be bound by the Employer's recognition of Local 305 and the Local 305 CBA that resulted.

Local 206's position on the recognition of Local 305 was correct. When two or more bargaining units represented by different unions merge to the point that the historical bargaining unit can no longer be maintained, the result is a "new operation" and new bargaining unit. Whether such a new operation arises does not depend on whether the final location is "new" or any of the other factors raised in the Exceptions. It depends on the community of interest of the affected employees.

If one of the unions involved in such a merger has a "sufficiently predominant majority to remove any real question as to the overall choice of a representative," then the employer must recognize that union without an election. *Nat'l Carloading Corp.*, 167 NLRB 801, 802 (1967). Otherwise, a question concerning representation arises. The bar for a sufficiently predominant

majority is quite high, and Local 305 never came close. That bar is high to insure employee free choice. Nor can it substitute contractual recognition for a Board election.

Local 206 did not violate the Act by pursuing the position described above through grievances. In addition, it does not violate the Act to pursue a grievance on a representational issue unless there has been a final Board ruling on that issue. This is true even though such a grievance always raises the possibility of an incorrect ruling; any party can invoke the superior authority of the Board Decision.

## II. RESPONDENT INSISTED ONLY THAT SAFEWAY NOT RECOGNIZE LOCAL 306 WITHOUT AN ELECTION

### A. INTRODUCTION

In its bargaining, Respondent stood firm on two related propositions. First, it maintained and continues to maintain that the Employer had neither the duty nor the right to recognize Local 305 as the representative for the post-merger warehouse until after a Board election. Second, Local 206 insisted it was not bound in effects bargaining by the provisions of the Local 305 CBA. For example, Local 206 argued it was not bound by the provisions that set out how the two facilities' seniority lists would be dovetailed and that recognized Local 305 as the representative of all transferring employees.

On all other issues, Local 206 demonstrated flexibility through the end of bargaining. Therefore, a finding that Local 206 violated the Act is possible only if the Employer was required to recognize Local 305 as the exclusive representative of the post-merger, combined warehouse – without a Board election.

### B. MERE PROPOSALS ARE NOT INSISTENCE

An allegation that a party insisted on a permissive or illegal subject in bargaining requires a very specific showing. The General Counsel must show not only that the party made a proposal on the subject but that it conditioned reaching an agreement on its proposal. Moreover, the Board takes into account exactly what part or parts of its proposal the party was insisting on. In the case at hand, Local 206 insisted on its and its members' rights not to be bound by the

Local 305 CBA; Local 206 did not insist that the Employer recognize Local 206 or on the details of its proposals.

The standard for when a party's pursuit of an objective in bargaining violates the Act is well settled.

> A party violates its duty to bargain in good faith by insisting on an unlawful proposal. However a party does not necessarily violate the act simply by proposing or bargaining about an unlawful subject. Rather, what the Act prohibits is the insistence, as a condition precedent of entering into a collective bargaining agreement that the other party agree to an unlawful provision.

*Guard Publ'g Co.*, 351 NLRB 1110, 1120 (2007) (citations and quotation marks omitted), *overruled on other grounds*, *Purple Commc'ns, Inc*., 361 NLRB 1050 (2014); *Sheet Metal Workers Local Union No. 20* (*George Koch Sons, Inc*.), 306 NLRB 834, 834 (1992); *Nat'l Mar. Union (Texas Co.)*, 78 NLRB 971, 981-82 (1948). This high bar makes sense when one considers the reason why it is illegal to insist on an unlawful or permissive subject. The problem is not in the proposal itself but in the refusal to bargain of the party proposing it.

> But what the Act does not permit is the insistence, as a condition precedent to entering into a collective bargaining agreement, that the other party to the negotiations agree to a provision or take some action which is unlawful or inconsistent with the basic policy of the Act. Compliance with the Act's requirement of collective bargaining cannot be made dependent upon the acceptance of provisions in the agreement which, by their terms or in their effectuation, are repugnant to the Act's specific language or basic policy.

*Texas Co.*, 78 NLRB at 981-82 (footnote omitted).

Thus, in *Texas Co*., the Board found insistence because, among other findings, it found the union representative "stated that even if the Companies were to accede in part to NMU's wage demands, NMU would not make a contract which did not contain the [illegal] hiring-hall clause." *Id.* at 982 n.21.

Since a proposal may include a mix of mandatory, permissive and unlawful subjects, it matters whether the proponent was insisting on the parts of it that were nonmandatory. *George Koch Sons, Inc.*, 306 NLRB at 834. For example, the Board in *George Koch Sons* held that

whether a union could raise a severability defense depended on whether it insisted on its language in its entirety or only on parts of it. *Id*. "[W]e note that determination of whether a union violates Section 8(b)(3) by insisting to impasse on contract language that constitutes an unlawful subject of bargaining requires that the Board examine the language upon which the union actually insisted." *Id*.

## C. THE ALJ CORRECTLY CREDITED THE EMPLOYER'S NOTES OVER RUYGROK'S TESTIMONY

Respondent will show below that there was only one proposal on which it insisted: that the Employer not recognize Local 305 as the representative for the combined bargaining unit. On the remaining aspects of its proposals, Local 206 showed flexibility up to the end of bargaining. However, underlying this legal question is a credibility issue: whether one should credit the Employer's own detailed contemporaneous notes or Doug Ruygrok's generally-worded later testimony.

The ALJ determined the contemporaneous notes should be credited over the later testimony. ALJ Decision, p. 7 nn.15-16, p. 13 n.33, *see also* ALJ Decision, p. 7 n.18, p. 15 n.38, p. 17 nn.44-45 (crediting contemporaneous notes over other assertions by Employer).

> I credit Woods' contemporaneous bargaining notes as accurately reflecting what transpired at these as well as other bargaining meetings . . . . In this regard, I note that during his testimony regarding the events of June 23-24, Ruygrok, claiming that he independently recollected what had been said, tended to summarize rather than repeat what was actually said by the parties. For example, Ruygrok testified that Respondent (White) was "trying to impose their contracts on the Albertson facility," that is, PDC (Tr. 142-143). As will be discussed in more detail below, that is not what the notes reflect was actually said or occurred. I thus credit the accuracy of the bargaining notes over Ruygrok's testimony when they conflict.

ALJ Decision, p. 13 n.33.

Two additional facts support the ALJ's credibility determination. First, Ruygrok himself acknowledged the notes are more reliable and detailed than his memory of what occurred. Tr. 77; *see also* Tr. 76-77, 141, 211-16, 221. Second, the Employer called Woods to testify as to

the accuracy of his notes but did not ask him his recollection about what was said about the topics on which Ruygrok's testimony contradicted Woods's notes. Tr. 322-25.

Neither the General Counsel nor the Charging Party seeks to overrule the ALJ's credibility determinations. However, both ask the Board to make findings that require crediting Ruygrok's testimony over the Employer's contemporaneous notes. *See, e.g.*, Employer Brief on Exceptions, p. 18 (relying on Ruygrok's characterization of Respondent's position regarding contract during bargaining), p. 19 (same, Respondent's position on 206 representational role), p. 20 (same, transition agreement); General Counsel Brief on Exceptions, p. 11 (claiming without citation that June 23 proposal required application of Clackamas contracts to PDC), p. 32 (ALJ "wrong" on questions of whether Respondent demanded Employer withdraw recognition from Local 305 and apply Local 206 contract), p. 34-35 (without citation, characterizing Respondent's positions contract application and recognition consistently with testimony rather than notes), p. 37-38 (same, contract application).

For example, in the quote above, the ALJ found that Ruygrok's testimony contradicted the contemporaneous notes about what Respondent proposed happen to the Clackamas contract at PDC. ALJ Decision, p. 13 n.33. Nonetheless, the Employer's brief claims that "Ruygrok testified, *without rebuttal*, that Stan White's position throughout bargaining was that the three Local 206 CBAs at the Clackamas facility would govern at the PDC." Employer Brief on Exceptions, p. 18 (emphasis added). This is false. Ruygrok's testimony was rebutted by the Employer's own notes, and the ALJ credited the notes.

Neither the General Counsel nor the Employer assert any reason why the Board should overrule the ALJ's credibility determinations, and their burden would be a heavy one had they tried. General Counsel Brief on Exceptions, pp. 11, 32-38; Employer Brief on Exceptions, pp. 18-20. *Standard Dry Wall Prods., Inc.*, 91 NLRB 544 (1950), *enforced*, 188 F.2d 362 (3d Cir. 1951). Therefore, the Board should, like the ALJ, credit the Employer's notes over Ruygrok's testimony when the two contradict.

## D. RESPONDENT DROPPED ITS PROPOSAL FOR RECOGNITION

### 1. Local 206 Initially Proposed a Dovetail That Would Have Given It a "Sufficiently Predominant Majority"

Local 206 did not insist on recognition for any portion of the combined workforce because it clearly dropped all such proposals. Until January 20, but not after, Local 206 took the position that it should be recognized as the representative of its historic bargaining units because it would have a "sufficiently predominant majority" in those units. After January 20, Local 206 proposed a Board election to resolve representation issues and stayed firm on that position until bargaining ended.

As noted by the ALJ, to understand Respondent's initial proposals, it is important to note that at first the parties believed the warehouse consolidation would result in significant layoffs. ALJ Decision, p. 8; *see also* ALJ Decision, p. 4 n.6; *see also* RX 2 and JX 1, p. 2-3 (100 fewer employees would be required than are currently employed), RX 4 (listing "variances," which are layoffs); GC 15c, p. 3 and Tr. 253-54 (discussion of same in bargaining).

Local 206 initially took the position in bargaining that 90% of the work in the combined warehouse would have originated from the Clackamas and that therefore 90% of the available positions should be allocated to employees originating from the Clackamas – it said its employees were entitled to "follow their work."[1] GC 15c, p. 1; GC 15d, p. 1-2; GC 16, Proposal 4; GC 24a, Proposal 4.

The ALJ correctly found that Local 206 based this demand, and its position regarding recognition, on Article 3.7 of its existing CBA. ALJ Decision, p. 7 n.17, p. 27. Article 3.7 provided that the Employer must continue to recognize Local 206 after a transfer if it could "show majority representation in accordance with the controlling law." GC 2, p. 3. Obviously, this is a lawful provision since it specifically requires a lawful majority for recognition. *See Kroger Co.*, 219 NLRB 388, 389 (1975) (finding voluntary recognition language for after-

[1] Obviously, layoffs, preferential hiring, and the merger of seniority lists are among the mandatory subjects for effects bargaining of the sort at issue here. *See, e.g. Dodge of Naperville, Inc.*, 357 NLRB 2252, 2253-54, 2257 (2012) (majority and dissent, respectively); *PCMC/Pac. Crane Maint. Co.*, 359 NLRB 1206, 1210 (2013).

acquired stores lawful on grounds that similar limiting language will be implied even if not explicit). Such a proposal is a traditional proposal in these circumstances and reflects the reality of such corporate changes.

As discussed further below, 90% is a "sufficiently predominant majority" to support recognition. *See* Section III(C)(3), *infra*. Also as discussed below, the Board will maintain historic bargaining units whenever possible. *See* Section III(B)(1), *infra*. Finally, as discussed below, the Board makes representation determinations (such as what is an appropriate bargaining unit) based on employees and community of interest, not the direction of the move. *See* Section III(B)(2), *infra*.

Therefore, had Local 206 obtained the 90/10 dovetail it lawfully sought, it would have had a sufficiently predominant majority in its historic bargaining units, and recognition would have been required both by Board law and by Article 3.7. It is in this context, and in this context only, that Local 206 proposed that it continue as the representative of its historic units after the transfer. Compare GC 24a with GC 27, 34. Local 206 relied on a contract provision that specifically required it "show majority representation in accordance with the controlling law," and it proposed a dovetail that would have enabled it to do so. GC 2, p. 3.

**2. <u>Respondent Proposed a Board Election To Resolve Representation Issues.</u>**

More directly relevant to issues before the Board, Local 206 did not insist on its initial representation proposal because it dropped the proposal entirely. After January 20, Local 206 proposed and stood firm on its position that representation be determined by a Board election. ALJ Decision, p. 10 & n.28, pp. 11, 27; GC 15i; GC 15j; GC 32. It did so in writing so there is no dispute about this.

In about January of 2016, the Employer repurchased a number of stores it had sold to Haggen in order to obtain FTC approval of its purchase of Safeway. Tr. 243-44, 254, 292-93. The Employer indicated that fewer layoffs would be necessary.[2] *Compare* GC 15c, p. 3, RX2,

[2] Although this change in position was triggered by the acquisition of the Haggen stores, which occurred in January, Albertsons did not communicate it to Local 206 until April 15. Tr. 243-44, 254, 292-93. Even then, the Employer was tentative. *Id*.

Tr. 253 *with* GC 15g,15i, 15l p. 1-3, 15m, Tr. 292-93. As the Employer began backing down on layoffs, Local 206 changed its proposals on dovetailing. *Compare, e.g.*, GC 24a *with* GC 34 (switching from dovetail by volume to guarantee all bargaining unit employees would be offered positions).

The Union also clearly dropped its demand for recognition. Up through January 20, Local 206 had proposed that it be recognized in its historic units and its contracts continued indefinitely. GC 24a. However, after January 20, Local 206 switched to proposals built around a Board election. Thus, in its next draft of the Transition Agreement, Local 206 proposed that its contracts be applied only "until such time as the representational issues in the facility are decided." GC 27, Proposal 1. Other proposals as well were effective only "until such time as the representational issues in the facility are decided." GC 27 Proposals 4D, 4E, 5; *see also* Proposal 4A. Local 206 also changed all references to its bargaining units and contract to be "historical."

Local 206's June 23 proposal did not include application of its contracts to the Portland facility at all. GC 34. Local 206 proposed its contracts "will govern Clackamas for one year after transition to the Portland Distribution Center." GC 34, Proposal 5; *see also* Section II(D)(3), *infra*.

Local 206 also explained at the bargaining table that it thought representation would be determined by a Board election. For example, on May 3, the Employer's own notes report White as stating, "We believe that the Board will determine the representation. We believe we still need to do a transition agreement" and "Due to QCR when employees move over there they will vote on the representation." GC 15i. Again, on May 5, the Employer records White as saying, "the representational issues need to be decided by the NLRB." GC 15j.

Local 206 also reiterated the same position in writing. GC 32. For example on June 13, White wrote to Ruygrok that Local 206 would "stop proposing that each union maintain its historical units. However, that doesn't mean that Albertsons gets to pick Local 305 to represent

the entire warehouse. That means employees get to pick their union, democratically, through an election." GC 32.

Finally, the record demonstrates there were no demands for recognition in the Employer's own notes of bargaining after January 20. *Compare* GC 15c p. 1 (explicit demand for recognition on January 15) *with* GC 15d-15m (no such demands after January 20).

The ALJ found that all of the evidence showed Respondent genuinely and consistently supported a Board election:

> Respondent's stated expectation, pursuant to its May 5 proposal, that representational issues would ultimately be decided by a Board election are not only supported by Ruygrok's testimony, but also by Woods' bargaining notes as well. (Tr. 216; 222; GCX-15(j)). The Employer also explicitly acknowledged the changes in Respondent's proposals in Ruygrok's follow-up letter(s) to White on June 9, as discussed below (GCX-28).

ALJ Decision, p. 10 n.28; *see also* ALJ Decision, pp. 11, 27.

**3. <u>The Employer's Reading of Local 206's Proposals Is Implausible</u>**

Despite this finding, the General Counsel and Charging Party ask the Board to find that Respondent insisted on recognition. *See, e.g.*, General Counsel Brief on Exceptions, pp. 32, 34-35; Employer Brief on Exceptions, pp. 18, 19. They also claim Local 206 insisted on application of its CBA to the combined facility. General Counsel Brief on Exceptions, pp. 11, 32, 34-35, 37-38; Employer Brief on Exceptions, p. 18. There is no factual support for either position, as can be seen by reviewing the details of Local 206's final proposal.

As discussed above, the Employer's own notes confirm that, after January 20, Local 206 never proposed that it be recognized and repeatedly stated that the Board would determine who should be. *See* Section II(D)(2), *supra*. Nonetheless, Ruygrok testified that although Local 206 believed it was changing its position from recognition of Local 206 to a vote to determine recognition, that belief was not correct. Tr. 222. Ruygrok does not appear to be claiming the notes missed some explicit demand but rather that Local 206's June 23 proposals indirectly require application of its CBA to Portland. Tr. 222-33. This interpretation makes no sense and is incorrect.

First, Ruygrok pointed to a provision in the Union's June 23 proposal that employees receive one year of health care. Tr. 225-30. Local 206 explained clearly to the Employer that all it was seeking was a "severance" benefit for employees leaving its bargaining unit, to help them "during the transition." GC 49; GC 15l, p. 1-2. No one could read an agreement to provide a year of severance benefits as requiring an employer to adopt a full CBA, and Local 206 made quite clear it did not intend such a requirement. If the Employer genuinely doubted whether this was the case, it could have simply proposed limiting language – "The Employer will submit the funds necessary to continue benefits for one year but will not be required to continue the Local 206 contract in order to facilitate those benefits," for example.[3]

Next Ruygrok points to Proposal 5. Tr. 231-33. That proposal provides that the Clackamas CBA and LOUs "will govern *Clackamas* for one year after transition to the Portland Distribution Center." GC 34, Proposal 5 (emphasis added). Ruygrok admitted that there was nothing in that proposal that said the Local 206 agreements would govern at the PDC. Tr. 233.

Obviously, the sensible way to read Proposal 5 is that it means what is says, that the Local 206 CBAs will continue at Clackamas. There was a need for such a provision, since transfers continued for another five months, and Local 206 contends that employee remained doing bargaining unit work long after that. GC 62, p. 11. Moreover, it protected Local 206 in case the Clackamas warehouse remained open or was reopened for a limited purpose. Indeed, the record reflects that it was reopened at one point to store turkeys. Tr. 349-54.

[3] Ruygrok claims, based solely on hearsay, that the trust fund would not have accepted health care contributions from an employer not party to a contract with Local 206. Tr. 225-30. Neither the Employer nor the General Counsel offered any detail or admissible evidence as to what sort of contract or relationship is necessary to provide severance benefits. Regardless of who ultimately represented the consolidated workforce, Local 206 would have a contractual relationship with Albertsons about the rights of employees arising from the transfer. *UFCW Local 540 v. NLRB* (*Wal-Mart Stores, Inc*.), 519 F.3d 490, 496 (D.C. Cir. 2008). Local 206 was also proposing an ongoing contractual relationship for bargaining unit work continuing to be performed at Clackamas, as discussed further below. GC 34, Proposal 5; *see infra*. The record does not show whether these relationships would have sufficed. In other words, the Employer's theory is at most an unproven reason why Local 206's proposal might not work. More importantly, to read a year of severance benefits as an indirect proposal to adopt a full CBA in light of Local 206's repeated disavowal of that intent is simply implausible.

Finally, it is possible that Ruygrok was also relying on the inclusion of an arbitration provision in the June 23 proposal as part of his argument that it actually applies the Local 206 CBA to Portland. Tr. 237; GC 34 Proposal 12. Of course, any contract must have some enforcement mechanism to be meaningful, and arbitration is the favored enforcement mechanism. *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 566 (1960); 29 U.S.C. § 173(d). Borrowing the parties' existing arbitration process is obviously just a way to avoid reinventing the wheel, and it would be nonsensical to read it as somehow committing the Employer to the full CBA.

As can be seen from the analysis above, by June, Local 206 had withdrawn entirely any proposal that the Clackamas contract be applied at the PDC. For this reason, to the extent that lines 1-2 and footnote on page 25 in the ALJ's decision can be read as holding that Respondent insisted on any application of the Clackamas contract at the PDC, Respondent excepts to such a holding. ALJ Decision, p. 25 lines 1-2; *see also* ALJ Decision, p. 25 n.55. However, Respondent reads the Decision as holding only that Respondent insisted it could engage effects bargaining about the closure. The Respondent reads the findings about the application of contracts as being a legal holding about proposals within the scope of effects bargaining rather than a finding that Respondent insisted on application of its contract.[4] ALJ Decision, p. 25 n.55.

## E. LOCAL 206 DID NOT INSIST ON "FRACTURING" THE BARGAINING UNIT

The Charging Party and General Counsel have used the word "fracturing" quite freely in this case. At times they use the word to refer to a proposal to modify a bargaining unit. There is

[4] The ALJ clearly and repeatedly rejected the General Counsel's and Charging Party's position that Respondent ever proposed that its contract simply become the contract for the CDC without a sufficiently predominant majority or Board election. *See, e.g.*, ALJ Decision, p. 7 nn.16 & 18, p. 10 n.28, p. 13 n.33, p. 15 n.38, p. 27. The Respondent did propose on May 3 that the terms of its contract apply to the employees currently under them "until such time as the representational issues in the facility are decided." GC 27, Proposal 1. However, its next proposal dropped the idea. GC 34. The ALJ held that it would have been appropriate for Respondent to insist on such a proposal, since Respondent had a right to bargain about the initial terms and conditions under which they would be offered employment, and the contract represented the *status quo ante*. ALJ Decision, p. 22. Therefore, the ALJ did not need to determine whether Respondent insisted upon or merely proposed that the employees in its units be allowed to maintain their existing terms and conditions of employment until a Board election. That said, the ALJ did note that Respondent showed flexibility in the details its proposals up to the end of bargaining. ALJ Decision, p. 13.

no reason to treat the Portland wall-to-wall bargaining unit as the only historical bargaining unit. About two thirds of the employees in the combined workforce came from departmental bargaining units, so, if anything, those departmental bargaining units were the historical units. JX 1, p. 1. In any event, Local 206 dropped proposals for departmental units at the same time it dropped its proposals for recognition. *See* Section II(D)(2), *supra*.

At times, the Charging Party and General Counsel have used the term "fracturing" to mean any proposal by Local 206 that its employees receive something other employees did not. This is not illegal; it is a necessary consequence of effects bargaining for the merger of two bargaining units. *Wal-Mart Stores, Inc*., 519 F.3d at 495-96. Indeed, in a recent case, the Board held that even after the elimination of a bargaining unit, the obligation to bargain effects continues. *Id*. Thus, not only do the employees from the eliminated bargaining unit have something others do not, but their union continues to play an active role on those matters.

Moreover, to create a new "fracturing" theory as proposed by the General Counsel would negate the right of a union to negotiate the effects of a relocation or closure. Effectively, a union under this theory cannot negotiate any kind of continuing obligation – whether it be protection from "layoffs, severance pay, health insurance coverage and conversion rights, [or] preferential hiring at other of the employer's operations." *Dodge of Naperville, Inc.*, 357 NLRB at 2253-54, 2257 (majority and dissent, respectively).

**F. THE PARTIES' DISPUTE WAS ABOUT THE RECOGNITION OF LOCAL 305**

The issue on which neither side budged was the fundamental one of whether Local 305 could represent the combined, post-merger warehouse without a Board election.

The ALJ held that the Employer first indicated its position on representation of the consolidated warehouse in on December 23, 2015, when it stated that it viewed the process as a series of tiny accretions, in which each "handful of current Local 206 employees . . . will sequentially be merged into the Local 305 contract and Local 305 representation." ALJ Decision, pp. 7-8 (quoting GC 20, p. 5) (emphasis in GC 20); ALJ Decision, p. 11. The

Charging Party viewed the total "numbers at the 'end of the day'" as irrelevant. ALJ Decision, p. 8 (quoting GC 20, p. 5).

On January 15, 2016, the Employer proposed to Local 206 as part of a transition proposal that "Wage rates will be as per the renegotiated Teamsters local 305 contract as it exists as of the time of the transfer, which will apply to all transferred employees." GC 23. On January 22, the Employer informed Local 206 that it had begun those negotiations with Local 305. ALJ Decision, p. 9; GC 26.

On June 6, the Employer and Local 305 entered into a CBA specifically for the combined facility. GC 31; tr. 388. It would come into effect as of the time of the transfer. GC 31, p. 34. It recognized Local 305

> as the sole collective bargaining agent in a single, indivisible bargaining unit for all classifications contained in appendix "A", including driver and warehouse workers . . . working at the current Portland facility and/or employed by Albertsons, Inc. at its Distribution Center located within the jurisdiction of Teamsters Joint Council No. 37, and/or any Company operation merged into the Company's current Portland facility . . .[5]

GC 31, p. 4. The jurisdiction of Teamsters Joint Council No. 37 includes the Clackamas. ALJ Decision, p. 10 n.29; Tr. 242, 357.

The Employer continued to demand, in correspondence and in all of its proposals at bargaining, that Local 206 accede to the Employer's recognition of Local 305 and not propose anything at variance with the Local 305 CBA. ALJ Decision, p. 11-15; GC 15i, p. 1-3; GC 15k, p. 1; GC 15l p. 1; GC 30; GC 31, GC 33; GC 35; GC 37; GC 39 p. 4; GC 40; tr. 272-73, 278. Its final proposal, submitted August 2, was that the Local 305 contract (which by then included the recognition language quoted above) "will apply to all transferred employees." GC 40.

[5] The new agreement designated Local 162 as Local 305's agent in the representation of certain drivers. ALJ Decision, p. 10 n.29; GC 31, p. 4; see also GC 67. Prior to the transfer, Local 162 and Local 305 had shared the drivers at Clackamas, with about 70% belonging to Local 162 and 30% to Local 305. ALJ Decision, p. 10 n.29; GC 6, p. 41 provision 1; Tr. 366-67. Neither union was the other's agent. ALJ Decision, p. 10 n.29; GC 6, p. 41 provision 1; Tr. 366-67. Each year, drivers bid according to seniority for which union would represent them. GC 6, p. 42 items (b) and (c) at top of page. None-the-less Local 305 became the representative of employees previously represented by Local 162 without the employees' consent.

Meanwhile, as discussed above, Local 206 took the position at the table and its proposals, that the Employer could not recognize Local 305 without an election and Local 206 was not bound by the Local 305 CBA. Section II(D)(2), *supra*; GC 15i, p. 1-3; GC 15l, p. 1.

For an example of how it was Local 305's status that drove the parties apart, consider their discussion on May 3 of the Regional Director's dismissal of Local 206's first ULP.

> [White:] The reason the company did not break the law was because you only said 305 would be the union to a few people. It is too soon to tell who will represent the employees.
>
> [Ruygrok:] What makes you believe this?
>
> [White:] We believe that the Board will determine the representation. We believe we still need to do a transition agreement . . .
>
> [White:] 305 cannot represent us.
>
> [Ruygrok:] You are not talking about the Albertsons employees. To my knowledge 305 is only bargaining for the Portland DC.
>
> [White:] We believe that the response was we cannot represent the employees in Portland and 305 cannot represent the employees after either.
>
> [Ruygrok:] Can you point that out in the ruling.
>
> [White:] I will get that to you.
>
> [Ruygrok:] What is your intent today[?]
>
> [White:] Transition agreement, the ruling was that no final representation decision can be made until after the move. In the mean time we want to talk about how our people move over, in key positions and how they move to the new warehouse . . .
>
> [White:] We believe 305 cannot negotiate on behalf of 206. Due to QCR when employees move over there they will vote on the representation.
>
> [Ruygrok:] 305 can bargain for itself and for the Portland facility.

GC 15i, p. 1-3.

As another example, when Local 206 presented it June 23 proposal, the Employer rejected the proposal on the grounds that it conflicted with the Local 305 contract.

> [White:] We believe we have made significant changes and believe that we are following the law.
>
> [Ruygrok:] Unfortunately these proposals do have an effect on current 305 members at the Portland DC. It is a single contract, what you are trying to force us to do is impose provisions on competing contracts. 305 has an[] existing contract. We are not going to treat one group unfairly to another.
>
> The 305 contract which you have seen is a superior contract.
>
> [White:] We do not believe it is a superior contract.
>
> [Ruygrok:] This is effective the day we move people over.

GC 15k, p. 1.

On August 5, the Employer declared impasse, implemented the August 2 offer, and applied the Local 305 CBA to all employees upon transfer. ALJ Decision, p. 15, p. 22 n.52; GC 42.

## III. THE EMPLOYER COULD NOT LEGALLY RECOGNIZE LOCAL 305

### A. INTRODUCTION

As can be seen from the facts set out above, the primary issue in this case is Local 206's position in bargaining that the Employer should not recognize Local 305 for the post-transition, consolidated workforce. Local 206's position would not require the Employer to violate the Act unless the Employer was required to recognize Local 305 without a Board election. However, the Employer was never required to recognize Local 305 without an election. Moreover it could not legally recognize Local 305, because Local 305 did not have a sufficiently predominant majority when it was prematurely recognized and never obtained it.

The Board has clearly established the framework for analyzing a possible merger of two bargaining units. First, it asks whether the historical units can be maintained or whether they have merged, creating a "new operation." Second, if the units have merged, the Board asks whether one union has a sufficiently predominant majority to preclude any question concerning representation. The General Counsel and Safeway conflate and distort both steps.

In the case at hand, the historical units cannot be maintained, because previously Safeway and Albertsons employees were separate, and now they will work side-by-side. This is what

Board cases mean when they ask whether an operation is "new." The Board does not care whether employees are using new or old equipment in a new or old facility. Nor does the Board care whether the work and employees at issue moved from the Clackamas to the PDC or vice versa. The Board is concerned about which groups of employees share a community of interest and whether that has changed sufficiently to warrant disrupting stable bargaining relationships.

Second, the "sufficiently predominant majority" standard applies in this case because it concerns the merger of two previously-represented bargaining units, not the addition of an unrepresented group to a represented one. In determining whether a sufficiently predominant majority exists, the Board applies the basic principles of the Act and common sense. Thus, a union cannot show a sufficiently predominant majority by negotiating a contract with a raise prior to a Board election and then asking employees to participate in ratifying it. Also, the Board counts each employee once and only once, in support of their own union not against it.

## B. THE EMPLOYER CREATED A "NEW OPERATION" WHEN IT COMPLETELY INTEGRATED THE CLACKAMAS AND PDC BARGAINING UNITS

### 1. Functional Integration of Bargaining Units Created a "New Operation"

When an employer reorganizes the work of two or more bargaining units, the Board begins its analysis by asking whether the historical bargaining units can be preserved or whether they have become so integrated as to create a "new operation" and a new, consolidated bargaining unit. The question of whether an operation is "new" is entirely about the appropriateness of bargaining units.

When companies with multiple bargaining units merge or restructure, the Board will generally maintain the existing bargaining relationships. *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 114, 119 (D.C. Cir. 1996); *Matlack Inc.*, 278 NLRB 246, 251-52 (1986). "The Board is reluctant to disturb units established by collective bargaining so long as those units are not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act." *Trident Seafoods*, 101 F.3d at 114 (quotation marks omitted). If two or more historically separate units "retain their separate identity," the Board will continue to find

separate representation appropriate, even if it would not have found separate units appropriate in the context of a new certification. *Id.* at 118, 120; *Matlack*, 278 NLRB at 251-52. This standard serves in part to preserve the right of employees to choose their bargaining representative. 278 NLRB at 252. It also serves to preserve the stability of collective bargaining. 101 F.3d at 114, 118.

However, sufficient functional integration between two units will "obliterate" the old historical units and create a "new operation consolidating two previously separate units of employees." *Martin Marietta Refractories Co*, 270 NLRB 821, 822 (1984); *Trident Seafoods*, 101 F.3d at 120. In *Panda Terminals*, for example, the Board found that "There has been a total integration of the two operations, and former Santa Fe employees cannot be distinguished from transferred Panda employees without looking to their union insignia." *Panda Terminals, Inc.*, 161 NLRB 1215, 1221 (1966). The Board therefore found an "entirely new operation." *Id.* at 1222-23. Under these circumstances, separate representation cannot be maintained. *Trident Seafoods*, 101 F.3d at 120; 270 NLRB at 822; 161 NLRB at 1221-23.

A "new operation" in this sense does not require a change in work product, work methods, corporate identity, or physical location. *F.H.E. Servs., Inc.*, 338 NLRB 1095, 1096 (2003); *Martin Marietta*, 270 NLRB at 822; *Panda Terminals*, 161 NLRB at 1021-23.

For example, in *Panda Terminals*, the Board found an "entirely new operation" based on the integration of the workforces and the substantial number of employees integrated. 161 NLRB at 1220-21, 1222-23. The operation was not "new" in any other sense. *Id.* at 1216-19 (describing continuous history of operation since at least 1944). The Board found that "the work being performed at the combined terminal has remained identical to that previously handled at each of the separate facilities except that all freight has been co-mingled." *Id.* at

1220-21. The terminal housing the combined operations had been handling freight for one of the merging companies and represented by same union for over twenty years.[6] *Id.* at 1217-18.

Similarly, in *Martin Marietta*, the Board found a "new operation" based solely on the consolidation of two quarries, their management structure and their workforce. 270 NLRB at 822. Both quarries had long been operating at the same location and were physically joined by the blasting of some stone. *Id*. at 821-22. In *F.H.E.*, as well, the Board found that, "when Respondent KONE merged the previously separate bargaining units, the result was the formation of a new operation and the creation of a new bargaining unit. The old bargaining units no longer survived, nor did Local 3's role as bargaining representative of one of those units." *F.H.E. Servs., Inc*., 338 NLRB at 1096. Once again, the physical plant for the consolidated operation was not new; it was the one at which Local 3 had previously represented one of the units. *Id*. at 1095.

The General Counsel and Charging Party argue that PDC was not a "new operation" because it was an ongoing warehouse operation. General Counsel Brief on Exceptions, p. 19-22; Employer Brief on Exceptions, p. 23-27. However, the Board in these cases cited and relied upon by the General Counsel and the Employer is not concerned with whether warehouses are freshly built or forklifts newly purchased. The parties in the case at hand agree that the distinction between employees originating in Clackamas and those originating in Portland has been obliterated, so the consolidated operation is "new" in the only sense that matters.

**2. <u>The Direction of the Move Is Irrelevant</u>**

The General Counsel and Charging Party argue that there is no "new operation" in this case because the operation at the PDC was ongoing. General Counsel Brief on Exceptions, p. 19-22; Employer Brief on Exceptions, p. 23-28. This argument utterly ignores the logic of the cases upon which it purports to rely. The Board has never shown the slightest interest in whether

[6] In *Panda Terminals* and a later related case, *National Carloading*, a merger ultimately led to a consolidation of operations into the 47th Street Terminal. 161 NLRB at 1216; 167 NLRB at 802. The Board described a 1944 contract with BRC, one of the contending unions, that covered the 47th Street Terminal continuously until the dispute before the Board. 161 NLRB at 1217-19.

work moves from A to B or B to A, whether one or both or neither facility remains open after the reorganization. It cares only whether bargaining units that were once separate are now so integrated as to preclude maintaining existing bargaining relationships.

For example, consider *Panda Terminals*, discussed above. In that case, a union named BRC had long represented employees at a location called the 47th Street Terminal. 161 NLRB at 1216 (BRC represents employees at 47th Street), 1218 (BRC first recognized in 1944). It had a contract in place at the time of the move. *Id*. at 1222. Yet the Board held that the contract was no bar and an election must be held. *Id*. 1222-23. The Board ruled based on the principles of employee free choice and community of interest. *Id.* at 1220-23. It gave no weight to the direction of the move. *Id*.

This is required by the Board's recent decision in *PCC Structurals Inc*., 365 NLRB No. 160 (2017) in which the Board reaffirmed its traditional approach to the community of interest standard. As the Board emphasized this insures the "fullest freedom" of choice by the employees something they lost in the circumstances of this case.

A later case involving some of the same players was *National Carloading*, 167 NLRB 801. In that case, BRC represented clericals at the 47th Street office, which was the facility into which the combined operation was consolidated. 167 NLRB at 801. BRC also had a solid majority and they were part of a single unit rather than the multiple, smaller units for the incoming employees – BRC represented 34 employees at 47th Street, and they were being joined by two units of 8 and 12 members respectively. *Id.* at 802 n.20. Yet the Board found a question concerning representation. *National Carloading* matches the case at hand on almost every detail relied upon by the General Counsel. Yet what is more important is the logic. The decision is based not on geography, or the exact break-down of bargaining units. *Id.* at 802. It is based on the principles of employee free choice and industrial peace. *Id*.

A third example can be found in *F.H.E. Services*, 338 NLRB at 1095-96. In that case, Local 3 represented employees at the facility into which operations were consolidated, on Long Island. 338 NLRB at 1095. Yet, Local 3 lost its representative status upon the merger. *Id*. at

1096. Again, the Board based its decision on community of interest and whether there was a sufficiently predominant majority, not on geography. *Id.*

The Board's practice of disregarding geographical arguments in cases involving the merger of two represented units is consistent with its overall practice of considering employees' representational history and the realities of working conditions rather than location. For example, both the majority and the dissent in *Nott Co.* rejected the idea of giving any weight to the direction of a consolidation – whether employees represented by a union moved to a new facility or were joined at their old facility by new employees. *Nott Co., Equip. Div.*, 345 NLRB 396, 401 n.18, 407 n.16 (2005).

The direction of the move in this case, whether from Clackamas to Portland or vice versa, is entirely irrelevant.

**3. <u>The Exceptions Raise Distinctions That Make No Difference</u>**

The General Counsel and Charging Party attempt to distinguish the cases discussed above, but can point to only surface differences. They ignore the underlying principles.

For example, the General Counsel points to the fact that *Panda Terminals* involved multiple mergers and a court case. General Counsel Brief on Exceptions, p. 21 (citing *Panda Terminal*s, 161 NLRB at 1216-22). However, the Board in *Panda Terminal*s said nothing to imply that the complexity of the case's posture was the basis for its holding. 161 NLRB at 1220-22. On the contrary, it rejected arguments based on corporate structure and considered instead the community of interest, bargaining history, and relative numbers of affected employees. *Id.* For example:

> We find no merit in the Unions' [competing] contentions that the instant proceeding is barred by either of their collective-bargaining agreements. Contrary to BRC's basic contention, the fact that National, Panda, and P & A are wholly owned subsidiaries of PIE is not conclusive herein, in view of the extensive bargaining history in separate units, as outlined above, with respect to the employees here involved.

*Id.* at 1222. What mattered is that once the bargaining units had been separate, and now there had been "a total integration of the two operations, and former Santa Fe employees cannot be

distinguished from transferred Panda employees without looking to their union insignia." *Id.* at 1221. See also, *PCC Structurals Inc., supra*.

The Employer does not attempt to engage *Panda Terminals* other than to say it concerns representation petition, not a ULP. Employer Brief on Exceptions, p. 27. The Employer and General Counsel raised this argument against a number of cases; it is dealt with below. *See* Section IV(C), *infra*; General Counsel Brief on Exceptions, p. 26; Employer Brief on Exceptions, p. 27.

The General Counsel and Charging Party point to the fact that *Martin Marietta* involved two adjoining quarries which were integrated into one by the removal of the stone between them and the construction of a ramp. General Counsel Brief on Exceptions, pp. 20-21 (citing *Martin Marietta Refractories Co.*, 270 NLRB 821); Employer Brief on Exceptions, pp. 26-27 (citing same). Yet it was not the obliteration of a physical wall that motivated the Board's ruling; it was the obliteration of the functional separation between two groups of employees that the removal of the wall enabled:

> These changed circumstances have obliterated the previous separate identities of the two units which existed when each group worked for different employers at two distinct facilities. Now, both groups of employees are employed by the same employer performing similar functions under common terms and conditions of employment. We accordingly find that one overall unit of all production and maintenance employees employed at the combined facility is now the sole appropriate unit.

270 NLRB at 822. Finding no sufficiently predominant majority, the Board ordered an election. *Id.* At no time in the process did it give any indication that it would have required recognition of one of the two unions had operations moved from one side to the other rather than continuing in both. *Id.*

The Charging Party points to the fact that the Board required successor employers in *Trident Seafood* and *Matlack* to continue bargaining in historical bargaining units. Employer Brief on Exceptions, pp. 25-26 (citing *Trident Seafood*, 111 F.3d at 114-15 and *Matlack, Inc.*, 278 NLRB at 251). Respondent relies on those cases primarily as examples of the reliance by

the Board on maintaining historical bargaining units when possible. No one is arguing that in the case at hand it is possible to maintain the historic separation between Safeway (Clackamas) and Albertsons (PDC) employees – the product for both stores is intermingled. ALJ Decision, p. 28 n.59 Nor is anyone disputing that Albertsons is a successor employer to Safeway – the very basis of Albertsons's ULP is its claim that Local 206 had a duty to bargain with Albertsons about the former Safeway employees.

**4. <u>The Exceptions Cite Irrelevant Cases</u>**

The General Counsel and Charging Party also argue there is no new operation in this case by citing a number of Board cases that have nothing to do with that proposition.

First, they point to accretion cases involving the combination of one bargaining unit with a group of unrepresented employees. General Counsel Brief on Exceptions, p. 17, 19-20, 23, 26 31, 34 *and* Employer Brief on Exceptions, p. 18, 24 *citing Frontier Tel. of Rochester, Inc.*, 344 NLRB 1270 (2005); *American Medical Response*, 335 NLRB 1176 (2001); *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001); *Gitano Distributing Center*, 308 NLRB 1172 (1992); *Super Valu Stores*, 283 NLRB 134 (1987); *Central Soya Co.*, 281 NLRB 1308 (1986); *Airport Bus. Service*, 273 NLRB 561 (1984); *Towne Ford Sales*, 270 NLRB 311 (1984). The differences between the Board's doctrine in single-union and multi-union cases are discussed in detail after the explanation of the "sufficiently predominant majority" standard, below. *See* Section III(C)(2), *infra*.

Next, the General Counsel and Charging Party point to *Boston Gas Co. (Boston Gas II)*, 235 NLRB 1354 (1978), for the proposition that no new operation exists in this case. General Counsel Brief on Exceptions, pp. 18, 20, 22; Employer Brief on Exceptions, p. 24. *Boston Gas II* held that an employer must recognize the union that represents the larger of two merged bargaining units without an election where "there is no basic change in the nature of the facility in question, *and there is also no reason of to question the majority status of the predominant Union*." 235 NLRB at 1355 (emphasis added). *Boston Gas II* was issued fairly early in the history of the "sufficiently predominant majority" standard and has a cursory legal analysis, so it

is probably of little assistance to the Board in this case. However, it says nothing to indicate that a continuity in operations can substitute for the sufficiently predominant majority.

As noted above, the Charging Party's discussion of when the Board will find one employer to be the successor of another is irrelevant, given that all parties agree Albertsons is a successor to Safeway. *See* Section III(B)(3), *supra*.

## C. LOCAL 305 NEVER HAD THE REQUIRED SUFFICIENCY PREDOMINANT MAJORITY

### 1. An Employer Need Not Recognize One of Two Unions In a Merger Unless That Union Has a Sufficiently Predominant Majority

If historical bargaining relationships cannot be preserved, then the Board's cases establish that the conflicting claims of the unions involved must be resolved through a Board election. *Dr. Pepper Snapple Grp.*, 357 NLRB 1804, 1812 (2011); *Metro. Teletronics*, 279 NLRB 957, 960 (1986), *Martin Marietta Refractories Co.*, 270 NLRB at 822; *Nat'l Carloading Corp*., 167 NLRB at 802; *Panda Terminals*, 161 NLRB at 1220-23. A Board election promotes employee free choice and resolves industrial strife; allowing an employer to recognize one of two competing unions defeats these principles. 357 NLRB at 1812; 279 NLRB at 960; 270 NLRB at 822; 167 NLRB at 802; 161 NLRB at 1220-23. Therefore, it is established that when bargaining units represented by different unions merge, a question concerning representation arises unless one of the unions is "sufficiently predominant to remove any real question as to the overall choice of a representative." *Nat'l Carloading Corp*., 167 NLRB at 802.

The Board first explained these principles in detail in *National Carloading*:

> It is also plain that neither group of affected employees is sufficiently predominant to remove any real question as to the overall choice of a representative.[7] In these circumstances, statutory policies will not be effectuated if, through application of ordinary principles of accretion, a bargaining agent is imposed on either segment of the newly integrated operation. Rather, it is our opinion that influences disruptive to industrial peace and a harmonious bargaining relationship will be eliminated only if the

[7] Footnote in original: "At the time of the hearing herein, National had 34 clerical employees, P & A had 12, and JSI had 8 such clericals working at the 47th Street office. This includes the four National clericals in the unit represented by BRC, who work in an office at 38th Street."

> conflicting representation claims are resolved through the processes of a Board-conducted election.

*Nat'l Carloading Corp*., 167 NLRB at 802.

Later, in *Martin Marietta*, the Board held:

> When an employer merges two groups of employees who have been historically represented by different unions, a question concerning representation arises, and the Board will not impose a union by applying its accretion policy where neither group of employees is sufficiently predominant to remove the question concerning overall representation. *Boston Gas Co.*, 221 NLRB 628 (1978). We find this to be the case here and thus, even if either of the Unions' collective-bargaining agreements remained in effect, it would not bar an election. *Massachusetts Electric Co.*, 248 NLRB 155 (1980).

270 NLRB at 822.

Most recently, it adopted the following summary of the law:

> As indicated by the General Counsel, in these circumstances the controlling precedent is not *Harte* [the standard for accretion between one represented and one unrepresented unit], but *Metropolitan Teletronics*, 279 NLRB 957 (1986), *enfd. mem.* 819 F.2d 1130 (2d Cir. 1987). In that case, the Board reaffirmed the rule, previously set forth in *Boston Gas Co.*, 221 NLRB 628, 629 (1975), and *Martin Marietta Refractories Co.*, 270 NLRB 821, 822 (1984), that
>
> > when an employer merges two separately represented work forces, the employer may not choose between the competing representational claims, unless one of the merged groups constitutes such a large proportion of the combined work force that there is no reason to question the continued majority status of that group's bargaining representative. [*Id.* at 960.]

*Dr. Pepper Snapple Grp.*, 357 NLRB at 1812 (quoting *Metro. Teletronics*, 279 NLRB at 960).

**2. <u>Single-Union Cases Are Irrelevant</u>**

The General Counsel and Charging Party criticize the ALJ's application of the sufficiently predominant majority standard by pointing to cases involving one union rather than the consolidation of two represented units. General Counsel Brief on Exceptions, p. 17, 19-20, 23, 26 31, 34 *and* Employer Brief on Exceptions, p. 18, 24 *citing Frontier Tel. of Rochester, Inc.*, 344 NLRB 1270 (2005); *American Medical Response*, 335 NLRB 1176 (2001); *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001); *Gitano Distributing Center*, 308 NLRB 1172 (1992);

*Super Valu Stores*, 283 NLRB 134 (1987); *Central Soya Co.*, 281 NLRB 1308 (1986); *Airport Bus. Service*, 273 NLRB 561 (1984); *Towne Ford Sales*, 270 NLRB 311 (1984). However, the Board applies very different standards in the two types of cases. *Dr. Pepper Snapple Grp.*, 357 NLRB at 1813; *Special Mach. & Eng'ring, In*c., 282 NLRB 1410, 1411-12 (1987); *Hudson Berlind Corp.*, 203 NLRB 421, 423 (1973). For example, in a merger between a union and a non-union facility, the union may continue to represent the consolidated bargaining unit even if only 40% of employees were previously represented. *Harte & Co*., 278 NLRB 947, 948 (1986). However, as discussed above, in a merger between two previously represented units, neither union may continue representation without a sufficiently predominant majority.

There are two reasons for this distinction. First, a Board election will "ensure that the disruptive influence that conflicting representation claims might have on industrial peace and harmonious bargaining relationships is eliminated." *Special Mach. & Eng'ring*, 282 NLRB at 1412. Second, conduct such as that of Albertsons in this case represents "the unilateral selection by an employer between conflicting representational claims of two or more unions" – a choice that should be made not by Albertsons but by the employees themselves through a Board election. *Hudson Berlind*, 203 NLRB at 423. A contrary rule would allow the employer to choose the less effective and more favored union touching upon principles animating Section 8(a)(2), 29 U.S.C. § 158(a)(2). This rules guards against such a result.

**3. <u>A "Sufficiently Predominant Majority" Is Well Over Two-Thirds</u>**

The Board will not force an employer to recognize one of two or more competing unions in a merged bargaining unit unless that union has a majority "sufficiently predominant remove any real question as to the overall choice of a representative." *Nat'l Carloading Corp*., 167 NLRB at 802. There is not yet a set numerical figure for such a majority. Nor need the Board determine one here, since the ALJ correctly found that Local 305 represented only 54.46% of the post-transfer, consolidated warehouse. ALJ Decision, p. 16; *see also* Section III(C)(3), *infra*.

That said, the figures in prior cases make clear that well above two thirds is required. For example, in *Martin Marietta*, 145 active employees were previously represented by the majority union and 75 by the minority union, giving the former a 66% majority. 270 NLRB at 821. The Board summarily rejected the idea that this was a sufficiently predominant majority. *Id*. at 821, 822.

In *National Carloading*, 34 employees had been represented by the majority union, and two groups of 12 and 8 employees had been represented by the minority union. 167 NLRB at 802 n.20. That results in a figure of 62%. The Board held that it was "plain" this was not sufficiently predominant. *Id*.

The Charging Party, while not engaging the cases above, claims that *Metropolitan Teletronics* supports a figure of 63%. Employer Brief on Exceptions, p. 33 (citing 279 NLRB at 960). However, the ratio between the majority and minority union in that case was 93% to 7%. As explained by the ALJ's Decision here:

> In this regard, it should be noted that in *Metropolitan Teletronics Corp.*, 279 NLRB 957 (1986), the Board *appears* to endorse a figure of 63% as a sufficient threshold. This figure is misleading, however, because it simply represented the percentage that the predominant union represented previously as compared to 5 percent by the competing union. Left out of these figures were new employees, which the Board presumes support the competing unions by the same ratio as existing employees. Thus, when new employees are added to the equation, the predominant union represented well over 90 percent of the entire bargaining unit.

ALJ Decision, p. 21 n.50 (emphasis in original). It is of course a familiar principle that the union support of new employees is presumed to mirror that of the existing workforce. *See, e.g.*, *Central Soya Co., Inc.*, 281 NLRB at 1309. The Employer neither acknowledges nor attempts to refute this point. Employer Brief on Exceptions, p. 33.

**4. <u>Local 305 Never Had a Sufficiently Predominant Majority</u>**

The Administrative Law Judge correctly found that at the time of the transfer, Local 305 represented only 54.46% of the combined workforce. ALJ Decision, p. 16. Specifically, he found the numbers and percentages for each union as follows:

> Local 305: 220 (pre-existing at PDC) + 85 (coming from [Clackamas]), totaling 305: 54.46%
>
> Local 206 (Respondent): 162 (all coming from [Clackamas]): 28.93%
>
> Local 162: 68 (all coming from [Clackamas]): 12.14%
>
> Local 555 (UFCW): 22 (all coming from [Clackamas]): 3.93%
>
> IAM 3 (all coming from [Clackamas]): 0.54%

*Id*. (footnote and citation omitted).

Prior to the transfer, Local 305's proportion was even lower. For example, it had 51.56% in November 2015 and 52.15% in February 2016. JX 1, p. 2-3. At no time in the record did Local 305 ever exceed 54.46%. JX 1.

The General Counsel and Charging Party propose a number of maneuvers to avoid these plain figures. For example, the Charging Party claims that, "Local 206 represented only 15% of the combined workforces at [Clackamas]." Employer Brief on Exceptions, p. 32. To reach this figure, the Charging Party counted only *one of three* Local 206 bargaining unit as a percentage of *all* employees. Thus, the 85% that Charging Party counts as not represented by Local 206 includes two bargaining units that are actually represented by Local 206. In other words, to determine what level of support Local 206 had in the consolidated workforce the Charging Party presumes that two of three Local 206 bargaining units *oppose* Local 206.[8]

Charging Party offers no explanation for such a peculiar presumption. *C.f. Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38-40 (1987) (presuming continued support for bargaining representative reduces industrial strife and protects employee free choice).

Ironically, Local 305, like Local 206, has employees in three separate bargaining units: Frozen Foods at Clackamas, Drivers at Clackamas, and wall-to-wall at PDC. JX 1. Yet when

[8] For example, consider the first line of the Charging Party's chart on page 32. It lists a total combined workforce of 653 employees. Employer Brief on Exceptions, p. 32. That figure includes three bargaining units represented by Local 206 – 188 of the 653 total employees are from 206 units. JX 1, p. 1. To reach the 15.2% figure in that row, the Charging Party divides 99 by 653. That means that 89 of Local 206's 188 employees are being counted as *not* supporting Local 206.

calculating Local 305's support, Charging Party counts those three bargaining units together without so much as mentioning that it is doing so.[9]

### 5. Local 305 Cannot Substitute Contractual Recognition of 162 members for a Board Election including them.

Perhaps most disturbing of all is the argument that Local 305 can claim a presumption of support from all employees previously represented by Local 162 because it allowed Local 162 employees to participate in ratification of a contract that Local 305 negotiated without having first shown the legally required majority. General Counsel's Brief on Exceptions, pp. 23-24; Employer's Brief on Exceptions, pp. 31-33.

Members of the Board have debated over the years just how much of a contractual framework a union can negotiate with an employer without first demonstrating that the union has the minimum support needed for the employer to legally recognize it. *See, e.g. Dana Corp.*, 356 NLRB 256, 261-62, 265 (2010) (majority holding "framework" acceptable, Hayes dissenting).

However, there is no dispute that a union and employer cannot enter into a full-blown contract that recognizes the union as the exclusive representative of a bargaining unit until *after* the union has shown sufficient support to make such recognition legal. *Int'l Ladies' Garment Workers Union v. NLRB* (*Bernhard-Altmann*), 366 U.S. 731, 736 (1961); *Dana Corp.*, 356 NLRB at 260 (majority so holding), 265 (dissent); *Majestic Weaving Co. of N.Y.*, 147 NLRB 859, 860 (1964). The mere fact of the employer's premature recognition affords the union "a deceptive cloak of authority with which to persuasively elicit additional employee support." 366 U.S. at 736; *see also* 147 NLRB at 860.

The Supreme Court and Board have held that negotiating a contract without the legally required showing of support taints any future showing. Yet here the General Counsel and Charging Party argue that such a contract not only doesn't *preclude* a showing of support but can

[9] For example, consider again the first line of the chart on page 32. It lists 337 employees under Local 305. Employer Brief on Exceptions, p. 32. Those 337 employees include 51 from CDC Frozen Foods, 44 from CDC drivers and 242 from PDC wall-to-wall. JX 1, p. 1.

*constitute* the showing. General Counsel's Brief on Exceptions, pp. 23-24; Employer's Brief on Exceptions, pp. 31-33. They ask the Board to substitute for its own election process a ratification vote following improper recognition, including only a non-representative portion of the proposed bargaining unit and in which recognition of Local 305 was packaged together with wage increases. General Counsel's Brief on Exceptions, p. 11; GC 31, pp. 4, 36.

And even by resorting to such blatant disregard for core principles of the Act, the General Counsel and Charging Party cannot attain the required percentage of employees. *See* Section III(C)(3), (4), *supra*.

## IV. RESPONDENT MAY DEFEND ITSELF AGAINST THE GENERAL COUNSEL'S CLAIMS

### A. PROCEDURAL POSTURE

The General Counsel and Charging Party raise several arguments based on the procedural posture of this case. All are without merit. Since the General Counsel alleges the Act required Local 206 to accede to the Employer's recognition of Local 305, Local 206 has a right to defend itself by disputing that allegation.

On March 3, 2016, Local 206 filed an Unfair Labor Practice charge against the Employer. It alleged that the Employer unlawfully recognized Local 305 as the representative of the combined, post-transfer warehouse for the reasons explained above. RX 1. On April 29, 2016 the Regional Director found the charge premature:

> Because the consolidation has not yet occurred, it is premature to determine the representational status of the employees at the Gresham facility post-consolidation. However, this does not obviate the Employer's duty to bargain with Local 305 about the effects of the consolidation on the wall-to-wall unit it currently represents. The investigation did not disclose evidence that the Employer has unlawfully recognized Local 305 as the representative of any employees . . .

*Id.*

About two weeks later, on May 16, 2016, the Employer and Local 305 agreed to the collective bargaining agreement discussed above, which recognized Local 305 as the representative for post-consolidation workforce. GC 31, p. 4; *see also* Section III(C)(5), *supra*.

On May 23, 2016, Local 206 filed a second ULP arguing that Local 305 had now gone beyond effects bargaining to recognition.

The Region dismissed Local 206's second ULP on August 26, 2016, at about the time of the consolidation. GC 65, p. 1. This time, the Regional Director found the Employer was required to recognize Local 305 as the exclusive representative of the post-consolidation warehouse without an election. *Id.* Local 206 appealed, and the General Counsel denied the appeal on December 15. GC 65, p. 4.

The General Counsel argues that the fact that Local 206 did not file a representational petition shows it did not "truly believe" its position. General Counsel Brief on Exceptions, pp. 27-28; *see also* Employer Brief on Exceptions, p. 29. The General Counsel does not specify how the sincerity of Local 206's beliefs should affect the Board's analysis. However, Local 206 does wish to note that the events outlined above made obvious that any petition Local 206 filed would be futile. The Regional Director first ruled that it would be "premature to determine the representational status" of the consolidated workforce until after the consolidation occurred. RX 1, p. 1. By the time the petition would no longer have been deemed premature, the Regional Director had made clear that he viewed Local 305 as the exclusive representative and the contract covering the consolidated warehouse as valid. GC 65, p. 1. Equally however Safeway could have at any time filed an RM Petition to resolve these questions. Local 305 could have filed its own RC Petition. Neither did.

**B. THE REGIONAL DIRECTOR'S DECISION IS NOT BINDING ON THE BOARD**

The Charging Party argues that, "From that point [of the General Counsel's dismissal] on, the Director's conclusion concerning the representation status of employees at the PDC became final and binding, which meant that it was not subject to reinterpretation in connection with the instant case." Employer's Brief on Exceptions, p. 31.

The ALJ correctly rejected this idea:

> In so concluding [that Local 206's defense has merit], I am very much aware that the General Counsel weighed in this issue when it decided to dismiss Respondent's charge against the Employer

> alleging that such recognition was unlawful, thus agreeing with the Employer's view that the combined [Clackamas] and PDC units were an "accretion." I am not bound in any way by the General Counsel's prosecutorial discretion in refusing to issue complaint, however, in determining whether Respondent's affirmative defenses to the allegations of the complaint have merit. *Chicago Tribune Co*., 304 NLRB 259 (1991); *South Alabama Plumbing*, 333 NLRB 16 (2001).

ALJ Decision, p. 22.

The fact that the General Counsel dismissed Local 206's ULP does not mean that Local 206 may not defend itself against the General Counsel in this one. *Hotel & Rest. Employees' Int'l Union, Local 274* (*Warwick Caterers*), 269 NLRB 482, 482-83 (1984). In *Warwick Caterers*, the union wished to defend against an 8(b)(7)(C) charge for picketing an employer for which it was not the certified representative by arguing that it was the representative of the employer it picketed because that employer was an alter ego of the one for which it was certified. *Id.* at 482-83. The ALJ ruled that he could not consider the argument because the Regional Director and General Counsel had rejected the theory in dismissing the union's complaint. The Board reversed. It held that hearing the union's defense would not force the General Counsel to issue a complaint. *Id*. at 483.

The Board also noted the very different functions carried out by the General Counsel and the Board. The General Counsel exercises full discretion over which cases to pursue, whereas the Board must afford respondents their right to present an answer in a "trial-like hearing." *Id*.

The crux of the General Counsel's theory in this case is that Local 206 insisted on proposals that were illegal because they contradicted the Employer's alleged duty to recognize Local 305 for the post-transfer, consolidated warehouse without an election. Local 206 has a constitutional right to argue in its defense that the Employer had no such duty.

Local 206 is not asking in this case that the Board order the Employer to cease and desist recognition of Local 305. Nor is Local 206 asking that the Board in this case order any sort of election. Local 206 simply asks that the Board dismiss the current complaints on the grounds that the General Counsel did not prove Local 206 insisted on anything illegal because the employer had unlawfully recognized Local 305.

### C. THE SAME "SUFFICIENTLY PREDOMINANT MAJORITY" STANDARD APPLIES IN ULP AND R CASES

The Charging Party also claims that the ALJ erred by applying the "sufficiently predominant majority" standard in a non-representational case. Employer Brief on Exceptions, p. 27-29. The Board has, of course, repeatedly applied the "sufficiently predominant majority" framework in unfair labor practice proceedings. *Dr. Pepper Snapple Grp.*, 357 NLRB at 1804; *F.H.E. Servs., Inc.*, 338 NLRB at 1095; *Metro. Teletronics*, 279 NLRB at 957.

It would be utterly unworkable to hold that the standard for whether an employer is required to recognize a union depends whether the question is first raised in a representational proceeding or ULP.

## V. RESPONDENT MAY PURSUE ITS GRIEVANCES

### A. THE SUPREME COURT HAS CONFIRMED THE RIGHT TO ARBITRATE REPRESENTATIONAL ISSUES

The General Counsel argues that two grievances filed by the Respondent violate the Act because they dispute Local 305's alleged right to represent the combined post-transfer warehouse. These allegations fail for the reasons set out above: Local 305 had no such right without a Board election. However, even if Respondent were wrong on this point, it would still not violate the Act by making the point in a grievance.

To understand the Board's developing case law on when parties to a collective bargaining agreement may pursue arbitration, one must begin by examining the three Supreme Court cases on the issue. They hold that parties have a right to arbitrate representational issues and to pursue in litigation any reasonable legal position.

First, in 1964, the Supreme Court held that not only that it is legal to seek arbitration of a representational issue, but that there is an affirmative right to do so. *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964). In *Carey v. Westinghouse*, the Supreme Court held that a union may compel an employer to submit a representational issue to arbitration despite the fact that Board has primary jurisdiction on representation issues. *Id.* at 266-67, 272. The Court noted that the employer could at any time invoke the Board's jurisdiction by seeking a unit clarification

petition, and any ruling by the Board would take precedence over the arbitrator's decision (unless the Board chose in its discretion to defer). *Id.* at 268, 270-72. The Court also reasoned that many contractual disputes involve a mix of representational and non-representational issues. *Id.* at 268-69. Finally, of course, the Court considered the extremely strong policy in favor of arbitration under the Act. *Id.* at 271-72.

In sum, the Court concluded:

> By allowing the dispute to go to arbitration its fragmentation is avoided to a substantial extent; and those conciliatory measures which Congress deemed vital to "industrial peace" and which may be dispositive of the entire dispute, are encouraged. The superior authority of the Board may be invoked at any time. Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area.

*Id.* at 272 (citation omitted).

Thus, the Court held that a party is entitled to pursue to arbitration a type of question that if wrongly decided will result in an order that the employer recognize the wrong union. *Carey* itself involved a jurisdictional dispute between two unions. 375 U.S. at 263. The Court acknowledged that the arbitrator might rule that the employer must recognize Union A but the Board would later determine that the employer must in fact recognize Union B. *Id.* at 266-68, 272. Of course, if the employer meanwhile did as ordered, and recognized Union A, it would be violating the Act. *Id*. at 266-67. So it is a necessary implication of *Carey* that a party may seek in arbitration a goal that may ultimately be held to violate the Act. *Id*. The Court also pointed out the obvious solution to this dilemma: any party may invoke the superior authority of the Board at any time. *Id.* at 268, 272.

The second relevant Supreme Court case is Bill Johnson's Restaurants. *Bill Johnson's Rests. v. NLRB*, 461 U.S. 731 (1983). In that case the Court considered a cease-and-desist order from the Board against litigation that the Board had concluded was without a reasonable basis and brought for a retaliatory purpose. *Id.* at 736-37. The Court held that the Board could not seek to enjoin litigation unless both were true – retaliatory motive alone was not enough. *Id.* at 743-44. Moreover, the Board had erred by making credibility determinations in assessing

whether the lawsuit at issue was without a reasonable basis. *Id.* at 744-745. The Court held in Footnote 5 that among the types of lawsuits that could be enjoined was one "that has an objective that is illegal under federal law." *Id.* at 737 n.5.

Finally, in *BE & K*, the Supreme Court extended its holding in *Bill Johnson's Restaurants* to preclude the Board from finding illegal after the fact the prosecution of "an unsuccessful suit with a retaliatory motive." *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 519-20 (2002). The Court made clear that it was shielding suits that in retrospect sought something the law did not permit, such as forcing employees to cease protected activity. *Id.* at 533-34. However, if the employer had a reasonable basis to believe it was seeking something permissible, it had a right to proceed. *Id*.

> For example, an employer may file suit to stop conduct by a union that he reasonably believes is illegal under federal law, even though the conduct would otherwise be protected under the NLRA. As a practical matter, the filing of the suit may interfere with or deter some employees' exercise of NLRA rights. Yet the employer's motive may still reflect only a subjectively genuine desire to test the legality of the conduct. . . . If such a belief is both subjectively genuine and objectively reasonable, then declaring the resulting suit illegal affects genuine petitioning.

*Id.* at 533-34.

The same reasoning applies in the case at hand. As discussed above, arbitration of representational issues inherently carries the risk that the arbitrator order recognition of the wrong union. *Carey*, 375 U.S. at 268, 272. Any party may avoid that result by putting the question to the Board, but if no party does then the arbitrator's order could be illegal. However, parties still have an affirmative right to arbitrate representational issues.

In other words, the fact that a question may have a wrong answer does not make it illegal to ask the question.

## B. THE BOARD PROHIBITS ARBITRATION OF REPRESENTATIONAL POSITIONS ONLY ONCE THEY CONFLICT WITH A FINAL BOARD DECISION

Following *BE & K*, the Board considered the implications of the Supreme Court's jurisprudence for parties pursuing representational issues in litigation. It has concluded the Act

prohibits parties from pursuing in arbitration a position inconsistent with a final Board ruling. However, it has never held that the Act prohibits pursuing in arbitration a position that might be wrong.

The Board's seminal case on this question is *Allied Trades Council* (*Duane Reade, Inc.*), 342 NLRB 1010 (2004). In that case, the employer expanded rapidly and added 60 stores that two rival unions both sought to represent. 342 NLRB at 1011. One, UNITE, filed a representation petition. *Id*. The other, respondent Allied Trades Council, filed for arbitration arguing that the stores were an accretion to its contractual bargaining unit. *Id*. The Council participated in the representation proceedings and failed to request review of the Regional Director's determination that none of the stores were the Council's bargaining unit. *Id*. at 1012.

The Board held that Allied's pursuit of the arbitration violated the Act – but only after the Regional Director's determination became final. 342 NLRB at 1012-13.

> Because no request for review was filed, the Decision and Direction of Election constitutes a final decision under Section 102.67(b) of the Board's Rules and Regulations. . . .
>
> By continuing to seek, through arbitration, an accretion to its bargaining unit *that is in direct conflict with the Regional Director's unit determination* in her Decision and Direction of Election, the Respondent has, in effect, sought to apply the terms of its collective-bargaining agreement to employees *whom the Board has already determined to be outside of its bargaining unit*. In so doing, the Respondent has insisted on and continues to insist on bargaining for a change in the scope of the existing bargaining unit and, therefore, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(3) of the Act. . . .
>
> The Respondent's arbitration request seeking application of the collective-bargaining agreement to nonunit employees was *incompatible with the determination of the scope of the bargaining unit in the August 3, 2001 Decision and Direction of Election. Because continuing to maintain the arbitration request after the date of the Decision and Direction of Election violates Section 8(b)(1)(A), (2), and (3)* under established NLRA principles, it can be condemned as an unfair labor practice under these subsections *from and after August 3, 2001*.

*Id*. at 1012-13 (citations omitted, emphasis added).

In so holding, the Board analyzed the Supreme Court cases discussed above. 342 NLRB at 1012-13, 1013 n.4. It held that footnote 5 of *Bill Johnson's Restaurants* survived *BE & K*, but that what footnote 5 prohibited was "maintaining the request for arbitration despite a contrary Board decision." *Id*. at 1013 n.4.

Finally, the Board held that its remedy should be limited to fees incurred after the Regional Director's Decision, because that was the time at which the union's conduct became illegal. 342 NLRB at 1013.

In the case at hand, Local 206 cannot be pursuing a position in conflict with a final Board Decision because there has been no final Board Decision. As discussed above, the General Counsel's exercise of prosecutorial discretion in declining to pursue Local 206's ULP is not a final decision and is not binding on Local 206 in other proceedings. Section IV(B) , *supra*. Local 206 not only made clear it will abide by any final determination in this case; it has placed its grievances in abeyance pending this Decision. ALJ Decision, p. 32 n61; GC 56.

The Board cases following *Duane Reade* have applied the same reasoning. Many have held that a union may not pursue in arbitration a position that is contrary to a final representational decision of the Board, but none that a union violates the Act by pursuing a position that is simply wrong. *See, e.g. Local 340, N.Y. N.J. Reg'l Joint Bd.* (*Brooks Brothers*), 365 NLRB No. 61, p. 1 (2017) (award conflicted with Unit Clarification petition, remedy only beginning on date of UC decision); *Standard Drywall*, 357 NLRB 1921, 1923 (2011) ("Where the Board has previously ruled on a given matter, and where the lawsuit is aimed at achieving a result that is incompatible with the Board's ruling, the lawsuit falls within the 'illegal objective' exception to *Bill Johnson's*." (internal quotation marks omitted)); *Sheet Metal Workers Int'l Ass'n, Local 27 (EP Donnolley*), 357 NLRB 1577, 1578 (2011) (same).

More broadly, the Board has held in a non-representational context that if there are some outcomes of an arbitration that would violate the Act and others that would not, a party still has the right to pursue it. *Manufacturers Woodworking Ass'n of Greater N.Y., Inc*., 345 NLRB 538, 541 (2005). The opposing party can, of course, argue in arbitration that a particular result would

be illegal, and the parties can limit their remedies to those that will comply with the Act. *Id.* at 541. In the case at hand, Local 206 has disavowed in writing any remedy awarding it representation rights, a disavowal the Employer could readily take to any arbitrator. RX 3.

The General Counsel and Charging Party attempt to avoid this clear framework by ignoring the relevant Supreme Court doctrine and focusing on Board cases that predate it. General Counsel Brief on Exceptions, pp. 29-30, 33, 40-41; Employer Brief on Exceptions, pp. 19-20. The older Board cases largely apply similar reasoning to those discussed above. For example, *Rite Aid* held that a union violates the Act "by continuing to seek enforcement of an arbitration award which is in direct conflict with the Board's unit clarification determination." *Teamsters Local 776* (*Rite Aid*), 305 NLRB 832, 835 (1991), *enforced*, 973 F.2d 230 (3rd Cir. 1992). As did *Duane Reade*, it limited its remedy to conduct after the date of the unit clarification decision. 305 NLRB at 835.

Other cases, while not incorporating the fully developed doctrine discussed above based their holdings on the unreasonableness of the position being pursued. For example, the General Counsel and Charging Party rely on *Chicago Truck Driver*s. General Counsel Brief on Exceptions, pp. 29-30, 33, 40-41 (citing *Chicago Truck Drivers* (*Signal Delivery Service*), 279 NLRB 904 (1986); Employer Brief on Exceptions, pp. 19-20. Yet in that case the General Counsel argued the union had no "colorable claim" that the two units at issue had merged. 279 NLRB at 906. The Board agreed, finding "the Union does not contend that its arbitration demands have a reasonable basis in fact or law." *Id.* at 907. In other words, the Union would have been entitled to argue that the two units had merged if there had been a reasonable basis for the argument, but it could not pursue a case on that theory knowing it had no basis in the hope that the arbitrator would force a merger that had not in fact occurred. *Id.* The same is true of *Emery Worldwide* and *Active Enterprises*, two other cases cited by the General Counsel and Charging Party. *Emery Worldwide, v. NLRB*, 966 F.2d 1003, 1006 (5th Cir. 1992) ("Union can not now seriously in good faith urge this court that the two units were effectually merged into one bargaining unit."); *IBEW Local 323* (*Active Enterprises*), 242 NLRB 305, 308-09 (1979)

(bargaining units at issue "plainly" treated by contracts as separate, and no basis to find actual bargaining unit distinct from contractual one); General Counsel Brief on Exceptions, p. 41; Employer Brief on Exceptions, p. 20.

Finally, to the extent the older cases diverge from current law, the Board should, of course, follow the current law, which was developed in light of Supreme Court decisions. *Active Enterprises*, for example, was decided in 1979 and so pre-dates nearly all of the relevant Supreme Court and Board precedent discussed above. 242 NLRB 305.

## C. IT IS LEGAL TO DISPUTE ANOTHER PARTY'S FACTUAL ASSERTIONS

Finally, the General Counsel and Charging Party argue that Respondent violated the Act by pursuing one grievance because Respondent's factual position was allegedly incorrect. As explained by the ALJ, the grievance

> alleges that work that is covered by the [Clackamas] agreements was still being performed <u>at [Clackamas]</u> by individuals who were not part of the bargaining unit there. The Employer denied the allegations of the grievance, claiming Respondent had its facts wrong – and accusing Respondent of an ulterior motive. . . . Respondent may have its facts wrong, but such factual dispute is ultimately up to an arbitrator to resolve in his/her capacity as fact-finder.

ALJ Decision, p. 31 (emphasis in original).

The General Counsel's argument is particularly extreme, because the only basis for his claim that Respondent had an ulterior motive is the fact that Ruygrok told White that the work was not being performed at Clackamas. General Counsel Brief on Exceptions, p. 43; Employer Brief on Exceptions, p. 22. Arbitrators would play little role in American labor relations if a union had to drop its grievance any time the employer asserted the grievance was factually incorrect.

## VI. CONCLUSION

For the reasons stated above, Respondent respectfully requests the Board affirm the ALJ's rulings, findings, and conclusions and adopt the recommended Order in full (or if deemed necessary, modified as specified in Respondent's Exception).

Dated: February 5, 2018

Respectfully submitted,

WEINBERG, ROGER & ROSENFELD
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By: */s/ David A. Rosenfeld*
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**PROOF OF SERVICE**

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction this service was made. I am over the age of eighteen years and not a party to the within action.

On February 5, 2018, I electronically filed the foregoing **RESPONDENT'S ANSWERING BRIEF IN OPPOSITION TO GENERAL COUNSEL'S AND CHARGING PARTY'S EXCEPTIONS AND IN SUPPORT OF RESPONDENT'S LIMITED CROSS-EXCEPTION** with the National Labor Relations Board, by using its CM/ECF system.

☑ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 5, 2018, at Alameda, California.

*/s/ Karen Kempler*
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